STATE OF MICHIGAN

COURT OF APPEALS

RALPH H. ADAMS and VIRGINA ADAMS,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF VAN BUREN,

Defendant-Appellee.

UNPUBLISHED

No. 186800
Wayne Circuit Court
LC No. 94-434579-NZ

Before: Hood, P.J., and Saad and T.S. Eveland*, JJ.

HOOD, J. (dissenting).

I must respectfully dissent pursuant to this Court's holding in *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 532 NW2d 183 (1995).

Plaintiffs, residents of defendant Van Buren Township, experienced two backups from raw sewage into the basement of their home from a sewage and waste disposal system owned and maintained by defendant. Defendant asserts that both sewage backups were caused by a grease blockage that resulted from an illegal discharge of grease into the system by someone upstream from plaintiffs. Plaintiffs alleged that the sewage came from defendant's sewer system, and that the condition constituted a trespass-nuisance unprotected by governmental immunity.

Plaintiffs moved for summary disposition under MCR 2.116(C)(10) on defendant's affirmative defense that the sewer blockage was caused by the wrongful acts of third parties "upstream." The trial court denied plaintiffs' motion, and later granted defendant's motion for summary disposition under MCR 2.116(C)(7). The trial court's ruling, as well as the majority opinion, contravene this Court's holding in *Citizens Ins Co v Bloomfield Twp*, 209 Mich App 484, 532 NW2d 183 (1995).

In *Citizens Ins*, the trespass-nuisance occurred when an unknown vehicle struck a fire hydrant located near the plaintiff's subrogee's furniture store. *Id.* at 485. This caused a water power surge and the power surge, in turn, caused the sprinkler pipes to burst in the plaintiff's sobrogee's store. The plaintiff's subrogee suffered thousands of dollars worth of property damage. This Court ruled that there was a sufficient factual dispute because the defendant owned and maintained the fire hydrant, and, therefore, the defendant owned and controlled the object (the fire hydrant) *from which* the trespass-

nuisance arose (or that caused the trespass-nuisance). *Id.* at 488, 489. The Court ruled that whether the fire hydrant was actually unreasonably defective was for the trier of fact to ascertain. *Id.* at 489.

Likewise, in the instant case, defendant owns or controls the object (the sewage and waste disposal system) *from which* the trespass-nuisance arose (or that caused the trespass-nuisance). *Id.* at 488, 489. Defendant's attempt to avoid liability by asserting that the intrusion of sewage onto plaintiffs' property was caused by the wrongful act of a third party is at worst meritless and at best a fact in dispute, and thus summary judgment was improvidently entered. "Liability for damage caused by a nuisance may be imposed where the defendant . . . owns or controls the property from which the nuisance arose, . . ." *Id.* at 488, citing *Kuriakuz v West Bloomfield Twp*, 196 Mich App 175, 177; 492 NW2d 757 (1992). Again, here, defendant owns or controls the sewage and waste disposal system from which the nuisance arose. I, therefore, believe that it is error to conclude that defendant is not liable because "there is no evidence that defendant created the raw sewage" or "controlled the property from which the raw sewage arose," or because defendant did not "contribute to the waste."

A motion for summary disposition pursuant to MCR 2.116(C)(7) should not be granted unless no factual development could provide a basis for recovery. *Harrison v Director of Dep't of Corrections*, 194 Mich App 446, 449; 487 NW2d 799 (1992). Accordingly, I conclude that the trial court erred in granting defendant summary disposition under MCR 2.116(C)(7).

/s/ Harold Hood